A

## DR SHAMSUL BAHAR ABDUL KADIR & ANOTHER APPEAL v. RHB BANK BHD

FEDERAL COURT, PUTRAJAYA
ARIFIN ZAKARIA CJ
ABDULL HAMID EMBONG FCJ
B HASAN LAH FCJ
JEFFREY TAN FCJ
ABU SAMAH NORDIN FCJ
[CIVIL APPEALS NO: 03(F)-5-12-2012(W) & 03(F)-6-12-2012(W)]
6 APRIL 2015

C

***BANKRUPTCY:*** *Bankruptcy notice – Leave to issue – Bankruptcy notice issued more than six years after date of judgment – Whether leave of court obtained – Rules of the High Court 1980, O. 46 r. 2 – Whether O. 46 r. 2 applied to bankruptcy proceedings – Whether bankruptcy proceeding an action upon judgment – Whether*
D *caught by s. 6(3) Limitation Act 1953 – Whether judgment could be executed without leave of court – Whether bankruptcy notice set aside*

***CIVIL PROCEDURE:*** *Execution – Writ of execution – Bankruptcy notice issued more than six years after date of judgment – Leave to issue – Whether bankruptcy proceeding a writ of execution within meaning of O. 46 r. 2 Rules of the High Court*
E *1980 – Whether issuance of bankruptcy notice required prior to leave of court under O. 46 r. 2 – Whether judgment could be executed without leave of court*

***WORDS & PHRASES:*** *'execution thereon not having been stayed' – Bankruptcy Act 1967, s. 3(1)(i) – Meaning of – Whether construed within context of s. 6(3) Limitation Act 1953 – Whether bankruptcy proceeding a writ of execution within*
F *meaning of O. 46 r. 2 Rules of the High Court 1980 – Issuance of bankruptcy notice – Whether judgment obtained more than six years could be executed without leave of court*

On 10 October 2000, a consent judgment was obtained in which the appellant
G had to settle a certain amount of sum to the respondent. However, due to the appellant's failure to settle the judgment sum, the respondent issued a bankruptcy notice against the appellant on 3 January 2011. The appellant applied to set aside the bankruptcy notice on the ground that it was invalid and liable to be set aside *ex debito justitiae*. It was alleged that the bankruptcy
H notice was issued without the leave of court as required under O. 46 r. 2(1)(a) of the Rules of the High Court 1980 ('RHC'). The High Court dismissed the appellant's application and ruled that the court was bound by the Federal Court decision in *Perwira Affin Bank Bhd v. Lim Ah Hee* ('*Lim Ah Hee*') where it was held that a bankruptcy proceeding was not executionary proceedings in the sense that it was a continuation of a judgment and leave was not
I required to issue the bankruptcy notice after six years. On appeal, the Court of Appeal affirmed the decision of the High Court. Hence, this appeal. It was

argued that both *AmBank (M) v. Tan Tem Son & Another Appeal* ('*Tan Tem Son*'), a case which was decided by the Federal Court shortly after leave was granted to the appellant to lodge the instant appeal, and *Lim Ah Hee* were wrongly decided in that the court took the simplistic approach, *to wit*, that a bankruptcy proceeding was not executionary proceedings and therefore, O. 46 r. 2 of the RHC did not apply to bankruptcy proceedings. The respondent, on the other hand, contended that *albeit* the *dicta* in *Lim Ah Hee* on O. 46 r. 2(1) of the RHC was *obiter*, it was decided in *Tan Tem Son* that *Lim Ah Hee* had correctly stated the law, and as such, *Tan Tem Son* should not be disturbed. Leave to appeal was granted by the Federal Court on 21 November 2012, *ie*, before the decision in *Tan Tem Son* on the following questions of law: (i) whether upon a true and proper interpretation of s. 3(1)(i) of the Bankruptcy Act 1967 ('BA 1967'), it was a mandatory requirement that a judgment creditor who intended to commence bankruptcy proceedings after more than six years from the date of the judgment, must obtain prior leave of court pursuant to O. 46 r. 2 of the RHC at the material time of filing the bankruptcy notice ('first question'); and (ii) whether the observation in *Lim Ah Hee* to the effect that such prior leave of court was not required, was decided in accordance with the requirements of s. 3(1)(i) of the BA 1967, or whether it was decided *per incuriam* ('second question'). *Vide* this appeal, the court only dealt with Civil Appeal No. 03(F)-5-12-2012(W) wherein the outcome of this appeal would bind Civil Appeal No. 03(F)-6-12-2012(W) which was jointly heard with this appeal.

**Held (allowing appeals with costs; setting aside bankruptcy notices)**
**Per Arifin Zakaria CJ, Abdull Hamid Embong, Hasan Lah, Jeffrey Tan and Abu Samah Nordin FCJJ:**

**(1)** The effect of s. 3(1)(i) of the BA 1967 is that a judgment creditor, who has obtained a final judgment or final order against a judgment debtor for any amount and execution thereon had not been stayed, was entitled to commence a bankruptcy proceeding against the judgment debtor. Section 6(3) of the Limitation Act 1953 ('LA 1953') provides that an action upon any judgment shall not be brought after the expiration of 12 years from the date on which the judgment became enforceable and no arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due. (paras 8 & 35)

**(2)** Until the advent of *Tan Tem Son*, a judgment creditor was entitled to commence a bankruptcy proceeding against the judgment debtor, if the judgment creditor could issue immediate execution upon the judgment or order. In that case, it was held that O. 46 r. 2(1) of the RHC, which did not apply to a bankruptcy proceeding, could not be employed to construe the words 'execution thereon not having been stayed' to mean that in addition to there being no stay of execution, the creditor must

A be in a position to issue immediate execution, and the only bar to the institution of bankruptcy proceedings is the limitation under s. 6(3) of the LA 1953. *Tan Tem Son* had clearly departed from history and case law and this court saw no alternative but to put it back to where it was, in line with other jurisdictions with a provision equipollent to s. 3(1)(i) B of the BA 1967. (paras 10, 11, & 59)

**(3)** In *Lim Ah Hee*, it was decided that a bankruptcy proceeding was not a writ of execution within the meaning of O. 46 r. 2 of the RHC and it was within the meaning of 'action' in s. 2 of the LA 1953. Therefore, it was caught by s. 6(3) of the LA 1953. However, the issues in that case C had nothing to do with the meaning of the words 'execution thereon not having been stayed' in the context of s. 3(1)(i) of the BA 1967. Rather, the issues there were about the applicability of s. 6(3) of the LA 1953 to bankruptcy proceedings and the validity of a bankruptcy notice where the judgment debtor had not disputed the claim stated in the bankruptcy D notice within seven days from the date of service of the said notice. Further, *Lim Ah Hee* did not state that leave was not required to issue a bankruptcy notice where six years had lapsed since the judgment or date of the order. Hence, this court could not agree with the trial court that in *Lim Ah Hee*, a bankruptcy proceeding was not executionary E proceedings in the sense that it was a continuation of a judgment and that no leave was required to issue the bankruptcy notice after six years. (paras 10, 39, 43 & 45)

**(4)** In *Re Woodall, ex p Woodall* and *Re ex p Ide*, a creditor was entitled to issue a bankruptcy if he was in a position to issue execution on his F judgment at the time when he issued the bankruptcy notice. A bankruptcy proceeding was not execution but the right of the creditor to issue bankruptcy notice was pegged to the right of the creditor to proceed to execution. A creditor was not entitled to issue bankruptcy notice if he was not in a position to issue execution on his judgment at G the time when he issued the bankruptcy notice. If by reason of the Rules of Court or on account of some valid legal reason a creditor was in no position to issue execution at the time when he issued the bankruptcy notice, then the creditor had no right to issue bankruptcy notice. (paras 53 & 54)

H **(5)** The meaning of the words 'execution thereon not having been stayed' should be construed in the context of s. 3(1)(i) of the BA 1967 and not from the perspective of s. 6(3) of the LA 1953. Section 6(3) should not be read to nullify O. 46 r. 2 of the RHC. Further, any person who is for the time being entitled to enforce a final judgment in the proviso to s. 3(1)(i) must be a person who is entitled to enforce a final judgment I without prior leave of court. (paras 57 & 60)

**(6)** A judgment creditor who commences bankruptcy proceedings after more than six years had lapsed from the date of judgment must obtain the prior leave of the court pursuant to O. 46 r. 2 of the RHC. On the facts, the judgment was obtained on 10 October 2000 and when the bankruptcy notice was issued on 3 January 2011, the judgment was more than six years old. In other words, when the bankruptcy notice was issued, the respondent was not in a position to execute the judgment without the leave of court. Leave should and could have been obtained. Since the answer to the first question was in the positive and would dispose of this appeal, there was no necessity to answer the second question. (paras 60 & 61)

***Bahasa Malaysia*** *Translation Of Headnotes*

Pada 10 Oktober 2000, satu penghakiman persetujuan telah diperolehi di mana perayu perlu menjelaskan jumlah wang tertentu kepada responden. Walau bagaimanapun, pada 3 Januari 2011, responden telah mengeluarkan satu notis kebankrapan terhadap perayu atas kegagalan perayu untuk menjelaskan jumlah penghakiman tersebut. Perayu telah memohon untuk mengenepikan notis kebankrapan itu atas alasan bahawa ia tidak sah dan layak untuk diketepikan *ex debito justitiae*. Adalah dihujahkan bahawa notis kebankrapan telah dikeluarkan tanpa kebenaran mahkamah seperti dikehendaki di bawah A. 46 k. 2(1)(a) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Mahkamah Tinggi telah menolak permohonan perayu dan memutuskan bahawa mahkamah terikat dengan keputusan Mahkamah Persekutuan di dalam *Perwira Affin Bank Bhd v. Lim Ah Hee* ('*Lim Ah Hee*') yang memutuskan bahawa prosiding kebankrapan bukanlah suatu prosiding pelaksanaan memandangkan ia adalah penerusan suatu penghakiman dan kebenaran tidak diperlukan untuk mengeluarkan notis kebankrapan selepas enam tahun. Atas rayuan, Mahkamah Rayuan telah mengesahkan keputusan Mahkamah Tinggi. Oleh itu, rayuan ini. Adalah dihujahkan bahawa kedua-dua *AmBank (M) v. Tan Tem Son & Another Appeal* ('*Tan Tem Son*'), satu kes yang telah diputuskan oleh Mahkamah Persekutuan selepas kebenaran diberi kepada perayu untuk memfailkan rayuan ini, dan *Lim Ah Hee* telah diputuskan secara salah di mana mahkamah telah mangambil pendekatan yang terlalu mudah, iaitu, bahawa prosiding kebankrapan bukanlah suatu pelaksanaan dan oleh itu, A. 46 k. 2 KMT tidak terpakai kepada prosiding kebankrapan. Responden, sebaliknya, berhujah bahawa walaupun *dicta* di dalam *Lim Ah Hee* berkenaan A. 46 k. 2(1) KMT merupakan *obiter*, malah ia diputuskan dalam *Tan Tem Son* bahawa *Lim Ah Hee* telah mencatatkan undang-undang dengan betul dan oleh itu, *Tan Tem Son* tidak boleh diganggu. Kebenaran untuk merayu telah dibenarkan oleh mahkamah ini pada 21 November 2012, iaitu, sebelum keputusan *Tan Tem Son*, berdasarkan persoalan undang-undang berikut: (i) sama ada berdasarkan tafsiran betul s. 3(1)(i) Akta Kebankrapan 1967 ('AK 1967'), ia adalah kehendak

A mandatori bahawa pemiutang penghakiman yang berniat untuk memulakan prosiding kebankrapan selepas lebih daripada enam tahun dari tarikh penghakiman perlu memperolehi kebenaran mahkamah berikutan A. 46 k. 2 KMT semasa memfailkan notis kebankrapan ('persoalan pertama'); dan (ii) sama ada pemerhatian dalam *Lim Ah Hee* bahawa kebenaran mahkamah
B sebegitu tidak diperlukan, telah diputuskan berdasarkan kehendak s. 3(1)(i) AK 1967, ataupun sama ada ia diputuskan *per incuriam* ('persoalan kedua'). Melalui rayuan ini, mahkamah telah mengendalikan Rayuan Sivil No. 03(F)-5-12-2012(W) di mana keputusannya akan mengikat Rayuan Sivil No. 03(F)-6-12-2012(W) yang didengar bersama-sama dengan rayuan ini.

C **Diputuskan (membenarkan rayuan-rayuan dengan kos, mengenepikan notis kebankrapan)**

**Oleh Arifin Zakaria KHN, Abdull Hamid Embong, Hasan Lah, Jeffrey Tan & Abu Samah Nordin HHMP:**

D **(1)** Kesan s. 3(1)(i) AK 1967 adalah di mana seseorang pemiutang penghakiman, yang telah memperolehi keputusan atau perintah muktamad terhadap penghutang penghakiman bagi jumlah tertentu dan pelaksanaannya tidak digantung, adalah layak untuk memulakan prosiding kebankrapan terhadap penghutang penghakiman. Seksyen 6(3) Akta Had Masa 1953 ('AHM 1953') memperuntukan bahawa sesuatu
E tindakan terhadap sebarang penghakiman tidak boleh dibawa selepas tamatnya tempoh dua belas tahun dari tarikh penghakiman tersebut boleh dikuatkuasakan dan tiada apa-apa tunggakan faedah penghakiman boleh dituntut selepas tamatnya tempoh enam tahun dari tarikh faedah tersebut menjadi tertunggak.

F **(2)** Sehingga *Tan Tem Son* diputuskan, seorang pemiutang penghakiman layak untuk memulakan prosiding kebankrapan terhadap penghutang penghakiman, jika pemiutang penghakiman boleh mengeluarkan pelaksanaan penghakiman atau perintah dengan segera. Di dalam kes tersebut, diputuskan bahawa A. 46 k. 2(1) KMT, yang tidak terpakai
G kepada prosiding kebankrapan, tidak boleh digunakan untuk mentafsirkan perkataan-perkataan "pelaksanaannya tidak digantung" untuk bermakna bahawa sebagai tambahan kepada ketiadaan penggantungan pelaksanaan, pemiutang perlu berada di dalam kedudukan untuk mengeluarkan pelaksanaan dengan segera, dan satu-
H satunya halangan kepada permulaan prosiding kebankrapan adalah had masa di bawah s. 6(3) AHM 1953. *Tan Tem Son* didapati telah mengabaikan sejarah dan kes undang-undang dan mahkamah ini tidak mempunyai alternatif tetapi untuk meletakkannya balik di tempat asalnya, setara dengan bidang kuasa lain yang mempunyai peruntukan
I yang sama dengan s. 3(1)(i) AK 1967.

**(3)** Dalam *Lim Ah Hee*, adalah diputuskan bahawa prosiding kebankrapan bukanlah suatu writ pelaksanaan di dalam erti kata A. 46 k. 2 KMT dan merupakan tindakan dalam erti kata "tindakan" di bawah s. 2 AHM 1953. Oleh itu, ia ditangkap oleh s. 6(3) AHM 1953. Walau bagaimanapun, isu-isu di dalam kes tersebut tidak mempunyai sebarang kaitan dengan makna perkataan-perkataan "pelaksanaannya tidak digantung" dalam konteks s. 3(1)(i) AK 1967. Padahal, isu-isu di sana adalah berkaitan dengan pemakaian s. 6(3) AHM 1953 kepada prosiding kebankrapan dan kesahan notis kebankrapan di mana penghutang penghakiman tidak mencabar tuntutan yang dinyatakan dalam notis kebankrapan dalam masa tujuh hari dari tarikh penyerahan notis tersebut. Tambahan, *Lim Ah Hee* tidak menyatakan bahawa kebenaran tidak diperlukan untuk mengeluarkan notis kebankrapan di mana tamatnya tempoh enam tahun dari tarikh penghakiman atau perintah. Oleh itu, mahkamah ini tidak bersetuju dengan mahkamah bicara bahawa dalam *Lim Ah Hee*, suatu prosiding kebankrapan bukanlah prosiding pelaksanaan di mana ia adalah penerusan penghakiman dan tiada kehendak untuk kebenaran diperlukan untuk mengeluarkan notis kebankrapan selepas enam tahun.

**(4)** Dalam *Re Woodall*, *ex p Woodall* dan *Re ex p Ide*, pemiutang layak untuk mengeluarkan kebankrapan jika beliau berada dalam kedudukan untuk melaksanakan penghakimannya pada masa beliau mengeluarkan notis kebankrapan. Suatu prosiding kebankrapan bukanlah pelaksanaan tetapi hak pemiutang untuk mengeluarkan kebankrapan diikat dengan hak pemiutang untuk meneruskan sehingga ke pelaksanaan. Seseorang pemiutang tidak layak untuk mengeluarkan notis kebankrapan jika beliau tidak berada dalam kedudukan untuk mengeluarkan pelaksanaan terhadap penghakimannya pada masa notis kebankrapan dikeluarkan. Jika berdasarkan Kaedah-Kaedah Mahkamah atau sebab-sebab sah yang lain seseorang pemiutang tidak berada dalam kedudukan untuk mengeluarkan pelaksanaan pada masa beliau mengeluarkan notis kebankrapan, maka pemiutang tidak mempunyai hak untuk mengeluarkan notis kebankrapan.

**(5)** Erti perkataan-perkataan "pelaksanaannya tidak digantung" perlu ditafsirkan dalam konteks s. 3(1)(i) AK 1967 dan bukannya dari perspektif s. 6(3) AHM 1953. Seksyen 6(3) tidak boleh dibaca untuk membatalkan A. 46 k. 2 KMT. Tambahan, sesiapa yang layak untuk menguatkuaskan penghakiman muktamad dalam proviso s. 3(1)(i) adalah seseorang yang boleh menguatkuasakan penghakiman muktamad tanpa kebenaran mahkamah.

**(6)** Seseorang pemiutang penghakiman yang memulakan prosiding kebankrapan selepas tamatnya tempoh enam tahun dari tarikh penghakiman perlu mendapatkan kebenaran mahkamah berikutan A. 46

k. 2 KMT. Berdasarkan fakta, penghakiman telah diperolehi pada 10 Oktober 2000 dan apabila notis kebankrapan dikeluarkan pada 3 Januari 2011, penghakiman adalah lebih daripada tempoh enam tahun. Dalam erti kata lain, apabila notis kebankrapan dikeluarkan, responden tidak berada dalam kedudukan untuk melaksanakan penghakiman tersebut tanpa kebenaran mahkamah. Kebenaran semestinya dan mungkin boleh diperolehi. Memandangkan jawapan kepada persoalan pertama dijawab dalam bentuk positif dan akan melupuskan rayuan ini, maka tiada kehendak untuk menjawab persoalan kedua.

**Case(s) referred to:**

*Abigroup Ltd v. Abignano (1992) 112 ALR 497* ***(ovrd)***
*AmBank (M) Bhd v. Tan Tem Son & Another Appeal [2013] 3 CLJ 317 FC* ***(ovrd)***
*AmBank (M) Bhd v. Yong Kim Yoong Raymond [2009] 2 SLR 659* ***(refd)***
*Dennehy (a bankrupt) v. Reasonable Endeavours Pty Ltd (2003) 130 FCR 494* ***(refd)***
*Ex parte Clements [1901] 1 QB 260* ***(refd)***
*In Re SMRM Sithamparam Chettiar; ex parte Sundra Singh [1934] 1 LNS 23 HC* ***(refd)***
*James v. Amsterdam-Rotterdam Bank NV and another [1986] 3 All ER 179* ***(refd)***
*Low Mun v. Chung Khiaw Bank Ltd [1987] 2 CLJ 400; [1987] CLJ (Rep) 172 SC* ***(refd)***
*Lowsley and another v. Forbes [1998] 3 WLR 501* ***(refd)***
*Moscow Narodny Bank Ltd v. Ngan Ching Wen [2004] 2 CLJ 241 FC* ***(refd)***
*National Westminster Bank plc v. Powney and Ors [1990] 2 All ER 416* ***(refd)***
*O'Mara Constructions Pty Ltd v. Avery (2006) 230 ALR 581* ***(refd)***
*Penning v. Steel Tube Supplies Pty Ltd (1988) 80 ALR 689* ***(refd)***
*Pepper v. McNiece [1941] HCA 27* ***(refd)***
*Perwira Affin Bank Bhd v. Lim Ah Hee [2004] 2 CLJ 787 FC* ***(dist)***
*Re A Bankruptcy Notice [1898] 1 QB 383* ***(refd)***
*Re A Debtor [1997] 2 All ER 789* ***(refd)***
*Re A Kurumpian [1918] 14 SSLR 144* ***(not foll)***
*Re Ahmad Lazim & Anor, Ex P Bank Kerjasama Rakyat (M) Bhd [1999] 2 CLJ 101 HC* ***(refd)***
*Re Coast Secorities No 9 Pty Ltd [1985] 7 FCR 293* ***(refd)***
*Re Connan, ex parte Hyde (1888) 20 QBD 690* ***(refd)***
*Re ex parte Ide (1886) 17 QBD 755* ***(refd)***
*Re ex parte Woodall (1884) 13 QBD 479* ***(foll)***
*Re: ex parte Feast (1887) 4 Morr 37* ***(refd)***
*Re: ex parte Follows [1895] 2 QB 521* ***(refd)***
*Re: ex parte Ford [1887] 18 QBD 369* ***(refd)***
*Re: ex parte Greaves [1913] 2 KB 300* ***(refd)***
*Re: ex parte Phillips (1888) 5 Morr 253* ***(refd)***
*Re: ex parte The Debtor [1906] 1 KB 344* ***(refd)***
*Re Lau Wan [2013] 6 HKC 64* ***(refd)***
*Re Li Man Hoo [2013] 6 HKC 116* ***(refd)***
*Re Lim Szu Ang, Ex p Kewangan Utama Bhd [2005] 7 CLJ 23 HC* ***(refd)***
*Re Man Po International Holdings Ltd [2012] 5 HKC 539* **(refd)**
*Re Pannowitz; Ex parte Wilson (1975) 38 FLR 184* ***(refd)***
*Rengasamy Pillai v. Comptroller of Income Tax [1970] 1 LNS 139 FC* ***(refd)***
*Ridgeway Motors (Isleworth) Ltd v. ALTS Ltd [2005] 2 All ER 304* ***(refd)***
*Tan Chwee Hock v. AmBank (M) Bhd [2012] 8 CLJ 905 CA* ***(refd)***

*United Malayan Banking Corporation Bhd v. Ernest Cheong Yong Yin [2002] 2 CLJ 413 FC* ***(refd)***
*Wee Chow Yong, Ex P; Public Finance Bhd [1990] 1 CLJ 176; [1990] 3 CLJ (Rep) 349 HC* ***(refd)***
*WT Lamb & Sons v. Rider [1948] 2 KB 331* ***(refd)***

**Legislation referred to:**
Bankruptcy Act 1967, s. 3(1)(i), (2)(ii)
Limitation Act 1953, ss. 2, 6(2), (3)
Rules of Court 2012, O. 45 r. 7
Rules of the High Court 1980, O. 46 r. 2(1)(a)

Bankruptcy Act of 1869 [UK], s. 6
Bankruptcy Act of 1883 [UK], s. 4(1)(g)
Bankruptcy Act 1985 [Sing], s. 3(1)(i)
Bankruptcy Act of 1914 [UK], s. 1(1)(g)
Limitation Act 1980 [UK], s. 24(1)
Limitation of Actions Act 1958 [AUS], s. 5(4)
Limitation Ordinance (Cap 347) [HK], s. 4(4)
Rules of the Supreme Court 1884 [UK], O. XLII rr. 10, 23

**Other source(s) referred to:**
*Bankruptcy in County Courts,* 7th edn, p 5
*Halsbury's Laws of England*, 3rd edn, vol 24, para 342
*Halsbury's Laws of England*, 4th edn, reissue vol 28, para 917
*Stephen's Commentaries on the Laws of England*, 21st edn, vol III, chapter 12, p 189
*Personal Insolvency: A Practical Guide*, Grier and Floyd 2nd edn, p 1.20
*Sales' The Law Relating to Bankruptcy, Liquidations and Receiverships*, 6th edn, p 16

*For the appellants - T Jayadeva; M/s Syarikat Radhakrishnan*
*For the respondent - Terence Phillips; M/s Nordin Torji & Yussof Ahmad*

*Reported by Kumitha Abd Majid*

## JUDGMENT

**Arifin Zakaria CJ, Abdull Hamid Embong, Hasan Lah, Jeffrey Tan and Abu Samah Nordin FCJJ:**

**[1]** These two related appeals, which involved similar issues of law and so were heard together, are against the judgment of the Court of Appeal dated 29 May 2012 which dismissed the appellant's appeals with costs. Leave to appeal was granted by this court on 21 November 2012 (that is, before the decision of this court in *AmBank (M) Bhd v. Tan Tem Son & Another Appeal* [2013] 3 CLJ 317; [2013] 3 MLJ 179) on the following questions of law:

> (1) Whether upon a true and proper interpretation of section 3(1)(i) of the Bankruptcy Act 1967, it is a mandatory requirement that a judgment creditor who intends to commence bankruptcy proceedings after more than 6 years from the date of the judgment, must obtain prior leave of

A Court pursuant to Order 46 Rule 2 of the Rules of the High Court 1980 (or Order 31 Rule 2 of the Subordinate Courts Rules 1980) at the material time of filing the bankruptcy notice?;

(2) Whether the observation of the Federal Court in *Perwira Affin Bank v. Lim Ah Hee* [2004] 3 MLJ 253 to the effect that such prior leave of Court B was not required, was decided in accordance with the requirements of section 3(1)(i) of the Bankruptcy Act 1967, or whether it was decided *per incuriam*?

**[2]** We need only to deal with Civil Appeal No. 03(F)-5-12-2012(W), as it was agreed that the outcome in the latter appeal would bind Civil Appeal C No. 03(F)-6-12-2012(W).

**[3]** The pertinent facts may be briefly stated as follows: By a consent judgment dated 10 October 2000, the appellant was ordered to pay RM554,000 to the respondent, by way of the following instalments: (a) RM54,000 to be paid on or before 15 November 2000, followed by D (b) consecutive monthly payments of RM20,000 each, from 15 November 2000 until full settlement. The appellant failed to settle the judgment sum. The respondent issued a certificate of indebtedness which stated that the appellant owed the sum of RM350,000.

**[4]** On 3 January 2011, the respondent issued a bankruptcy notice for the E sum of RM350,000, and had the same served on the appellant on 4 January 2011. The appellant applied to set aside the bankruptcy notice on the ground that the bankruptcy notice was invalid and liable to be set aside *ex debito justitiae*, it being issued without the leave of court as required by O. 46 r. 2(1)(a) of the Rules of the High Court 1980 (RHC). On 15 September 2011, F the learned Senior Assistant Registrar dismissed the appellant's application to set aside the bankruptcy notice. The appellant appealed to judge in chambers. On 9 November 2011, the learned judge dismissed that appeal with costs. Abdul Aziz Abdul Rahim J (as he then was) held as follows:

The only issue in this case is whether a bankruptcy is a writ of execution G within the meaning of O. 46 r. 2 Rules of the High Court 1980 and, if so, whether Judgment Creditor required leave before requesting for the Bankruptcy Notice to be issued. On the doctrine of *stare decisis* this Court is bound by the Federal Court decision on 2004 in *Perwira Affin Bank v. Lim Ah Hee* [2004] 3 MLJ 253 that bankruptcy proceeding is not executionary proceedings in the sense that it is a continuation of a H judgment and that no leave is required to issue the bankruptcy notice after six years.

**[5]** The appellant appealed to the Court of Appeal, where the issue was whether the issuance of a bankruptcy notice requires prior leave of court under O. 46 r. 2(1)(a) of the RHC (since replaced by the Rules of Court 2012) I where six years or more have lapsed since the date of the final judgment. On 29 May 2012, the Court of Appeal affirmed the decision of the High Court. Linton Albert JCA, delivering the judgment of the court, said:

[31] As rightly pointed out by learned counsel for both parties, the question before this Court is whether a bankruptcy proceeding is a writ of execution within the meaning of O 46 r 2(1)(a) RHC so that leave of court is required if the bankruptcy notice is issued 6 years or more after the date of the consent judgment here.

[32] It is clear as day light that the answer to this question turned on the meaning of the words "writ of execution" appearing on O 46 r 2(1) RHC.

[33] As also rightly pointed out by learned counsel for both parties, the words "writ of execution" on O 46 r 2(1) RHC had been interpreted by the Federal Court, per Abdul Hamid Mohamad FLC (*sic*), in *Perwira Affin Bank v. Lim Ah Hee*, as not to include a bankruptcy proceeding.

…

[35] In the light of the Federal Court's decision in *Perwira Affin Bank v. Lim Ah Hee*, we therefore find no error having been committed by the learned Judge in these 2 appeals which warrant our appellate intervention.

[36] While we agree with both learned counsel that the aforementioned passage on the judgment in *Perwira Affin Bank v. Lim Ah Hee* was by way of *obiter dicta*, not being made in answer to a question referred to the Federal Court for determination in that case, which is, can a judgment creditor in a bankruptcy notice claim for interest on a judgment debt more than 6 years after the date of judgment, it is nevertheless an authoritative pronouncement made by the highest Court in this country on the meaning of the words "writ of execution" in O 46 r 2(1) and action upon a judgment" in section 6(3) of the Limitation Act in the context of a bankruptcy proceeding.

**[6]** The Court of Appeal held itself constrained to follow *Perwira Affin Bank Bhd v. Lim Ah Hee* [2004] 2 CLJ 787; [2004] 3 MLJ 253, even though it perceived that what was enunciated by Abdul Hamid Mohamad FCJ, as he then was, delivering the judgment of the court, on O. 46 r. 2(1) of the RHC, in relation to bankruptcy proceedings, was *obiter*. We observe, that in *Lim Ah Hee*, all issue on whatever requisite leave under O. 46 r. 2(1) of the RHC were abandoned by the judgment debtor at the stage of appeal to judge in chambers (see *Lim Ah Hee* at 257) and the leave questions had to do with s. 6(3) of the Limitation Act 1953 (LA 1953) and s. 3(2)(ii) of the Bankruptcy Act 1967 (BA 1967) (see *Lim Ah Hee* at 258).

**[7]** Learned counsel for the appellant urged us to revisit the issue. He submitted that *Tan Tem Son*, which was decided shortly after leave was given to the appellant to lodge the instant appeal, and *Lim Ah Hee*, were wrongly decided. He further submitted that in those two decisions, the court took the simplistic approach, *to wit*, that a bankruptcy proceeding is not execution and that therefore O. 46 r. 2 of the RHC does not apply to a bankruptcy proceeding. On the other hand, learned counsel for the respondent contended

A that *albeit* that the *dicta* of this court in *Lim Ah Hee* on O. 46 r. 2(1) of the RHC was *obiter*, yet it was the conclusion of this court in *Tan Tem Son* that *Lim Ah Hee* correctly stated the law, and that as such we should not disturb *Tan Tem Son*.

B **[8]** In our considered opinion, the outcome of this appeal turns upon the construction of s. 3(1)(i) of the BA of 1967, which provides:

**S. 3 Acts of bankruptcy**

(1) A debtor commits an Act of bankruptcy in each of the following cases:

C …

*(i) If a creditor has obtained a final judgment or final order against him for any amount and execution thereon not having been stayed* has served on him in Malaysia, or by leave of the court elsewhere, a bankruptcy notice under this Act requiring him to pay the D judgment debt or sum ordered to be paid in accordance with the terms of the judgment or order with interest quantified up to the date of issue of the bankruptcy notice, or to secure or compound for it to the satisfaction of the creditor or the court; and he does not within seven days after service of the notice in case the service is effected in Malaysia, and in case the E service is effected elsewhere than within the time limited in the behalf by the order giving leave to effect the service, either comply with the requirements of the notice or satisfy the court that he has a counter-claim, set off or cross demand which equals or exceeds the amount of the judgment debt or sum ordered to be paid and which he could not set up in the action F in which the judgment was obtained or in the proceedings in which the order was obtained:

Provided that for the purposes of this paragraph and of section 5 any person who is for the time being entitled to enforce a final judgment or final order shall be deemed to be G a creditor who has obtained a final judgment or final order; (emphasis added)

**[9]** The effect of s. 3(1)(i) of the BA of 1967 is that a judgment creditor who has obtained a final judgment or final order against a judgment debtor for any amount and execution thereon not having been stayed is entitled to H commence a bankruptcy proceeding against the judgment debtor. That provision, it would seem, should be straightforward enough. But that has not proved to be so, as the words "execution thereon not having been stayed" have been differently interpreted by different courts, such that the learned authors of *Malaysian Civil Procedure* 2013 at para. 46/2/1 thus curtly I commented:

The provisions of Order 46 r 2(1)(a) have been held to apply to bankruptcy actions (*Re Lee Che Peh aka Lee Chee Peh; ex p Tractors Malaysia (1982) Sdn Bhd* [2003] AMEJ 0228; [2003] 5 MLJ 463; *Tengku Iskandar bin Tengku*

*Ahmad v Sime Bank Bhd* [2002] 1 AMR 174; [2002] 1 MLJ 312; *Re Haji Ahmad bin Lazim & Anor; ex p Bank Kerjasama Rakyat (M) Bhd* [1999] 2 AMR 1759; [1999] 5 MLJ 478; *Re Low Tung Kwai; ex p Perwira Affin Bank Bhd* [2001] 6 MLJ 39). These cases appear to have been overruled by the Federal Court decision of *Perwira Affin Bank v Lim Ah Hee @ Sim Ah Hee* [2004] 3 AMR 699; [2004] 2 CLJ 787, FC. However, in *Tan Chwee Hock v AmBank (M) Bhd* [2012] 8 CLJ 905, CA, the court reverted to the previous position that Order 46 applied to bankruptcy actions.

**[10]** We need to correct the aforesaid para. 46/2/1. *Tan Chwee Hock v. AmBank* was not a decision of the Federal Court. It was a decision of the Court of Appeal, where it was unanimously held that the enunciation in *Lim Ah Hee* on O. 46 was *obiter* and where it was held, by a majority, that O. 46 applies to bankruptcy proceedings. In so far as this court is concerned, (1) it held in *Lim Ah Hee* that a bankruptcy proceeding is not execution but an action upon a judgment within the meaning of s. 6(3) of the LA 1953, and, (2) it held in *Tan Tem Son* that O. 46 r. 2(1) of the RHC does not apply to a bankruptcy proceeding which is an action upon a judgment within the meaning of s. 6(3) of the LA 1953, that O. 46 r. 2(1) of the RHC, which does not apply to a bankruptcy proceeding, could not be employed to construe the words "execution thereon not having been stayed" to mean that in addition to there being no stay of execution, the creditor must be in a position to issue immediate execution, and that the only bar to the institution of bankruptcy proceedings is the limitation under s. 6(3) of the LA 1953.

**[11]** Until the advent of *Tan Tem Son*, a judgment creditor was entitled to commence a bankruptcy proceeding against the judgment debtor, if the judgment creditor could issue immediate execution upon the judgment or order. The history to that began after the English Bankruptcy Act of 1869. Section 6 of the English Bankruptcy Act of 1869 listed six acts of bankruptcy upon which a creditor might present a petition for the bankruptcy of the debtor (see *The Law Reports, Statutes*, 1869, at 399 – 400). But none of those six acts of bankruptcy bore semblance to s. 3(1)(i) of the BA 1967. That was because the modern system of bankruptcy laws was in the main introduced by the English Bankruptcy Act of 1883 (see *Stephen's Commentaries on the Laws of England*, 21st edn, vol. III, chapter 12, at p. 189). The present form of s. 3(1) of the BA 1967 first appeared in s. 4(1) of the English Bankruptcy Act of 1883, which repealed the English Bankruptcy Act of 1869. The words "execution thereon not having been stayed" first appeared in s. 4(1)(g) of the English Bankruptcy Act of 1883, which read:

> (1) A debtor commits an Act of bankruptcy in each of the following cases:
>
> ...
>
> (g) If a creditor has obtained a final judgment against him for any amount, and execution thereon not having been stayed, has served on him in England, or, by leave of the court, elsewhere, a bankruptcy notice under this Act, requiring him to pay the judgment debt in accordance with the terms of the judgment, or to secure or

A compound for it to the satisfaction of the creditor or the Court, and he does not, within seven days after service of the notice, in case the service is effected in England, and in case the service is effected elsewhere, then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice, or satisfy the Court that he has a B counter-claim, set off or cross demand which equals or exceeds the amount of the judgment debt and which he could not set up in the action in which the judgment was obtained:

(see The Law Reports, Statutes, 1883, at 286)

C **[12]** Those words "execution thereon not having been stayed" remained wholly unchanged in s. 1(1)(g) of the English Bankruptcy Act of 1914 (as amended by the Bankruptcy (Amendment) Act of 1926). "The Acts of 1914 and 1926 ... constitute a code which regulates the conditions under which bankruptcy can occur, the procedure by which a person is adjudicated bankrupt, the legal effect of bankruptcy, and its termination" (*Bankruptcy* D *Law & Practice* by Fridman, Hicks and Johnson at p. 3).

**[13]** Soon after the English Bankruptcy Act of 1883, the Straits Settlements introduced Ordinance No 44 (Bankruptcy) of 1888, wherein, s. 3(1)(i) provided:

E (i) If a creditor has obtained a final judgment against him for any amount and execution thereon not having been stayed has served on him in the Colony, or by leave of the court elsewhere, a bankruptcy notice under this Ordinance requiring him to pay the judgment debt in accordance with the terms of the judgment, or to secure or compound for it to the satisfaction of the creditor or the F Court; and he does not within seven days after service of the notice, in case the service is effected in the Colony, and in case the service is effected elsewhere, then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice, or satisfy the Court that he has a counter-claim, set off or cross demand which equals or exceeds the G amount of the judgment debt and which he could not set up in the action in which the judgment was obtained:

**[14]** The Federated Malay States enacted Enactment 2 of 1912, to provide for proceedings in bankruptcy, and the Bankruptcy Enactment of 1921 to replace Enactment 2 of 1912. Section 4(i)(i) in both Enactments of 1912 and H 1921 identically provided:

(i) If a creditor has obtained a final decree against him for any amount and, execution thereon not having been stayed, has served on him in the States, or by leave of the Court elsewhere, a bankruptcy notice under this Enactment requiring him to pay the judgment debt I in accordance with the terms of the decree or to secure or compound for it to the satisfaction of the creditor or the Court, and

> he does not within seven days after service of the notice, in case the service is effected in the States, and in case the service is effected elsewhere, then within the time limited in that behalf by the order giving leave to effect the service, either (a) comply with the requirements of the notice, or (b) satisfy the Court that he has a counter-claim, set off or cross demand which equals or exceeds the amount of the judgment debt and which he could not set up in the action in which the decree was obtained:

**[15]** All separate bankruptcy legislation of the Federated Malay States, Straits Settlements, and Johore enacted before the Federation of Malaya Agreement 1948 were repealed by the Bankruptcy Ordinance of 1959 (see *Rengasamy Pillai v. Comptroller of Income Tax* [1970] 1 LNS 139; [1970] 1 MLJ 233 per Lord Diplock), which, in turn, was replaced by the Bankruptcy Act 1967.

**[16]** But despite the comings and goings of Acts, Enactments and Ordinances, from the English Bankruptcy Act of 1883 to the Bankruptcy Act of 1967, the words "execution thereon not having been stayed" remained wholly intact and unchanged in all said English Bankruptcy Acts, FMS Enactments, SS Ordinances and the Bankruptcy Ordinance of 1959, always in a provision equipollent to s. 4(1)(g) of the English Bankruptcy Act of 1883. "... those words have remained in the English and Commonwealth legislation substantially unchanged from 1883 to the present day" (*Re Pannowitz; Ex parte Wilson* (1975) 38 FLR 184 at 188 per Riley J). Those words now appear in s. 3(1)(i) of the BA 1967, which is equipollent to s. 4(1)(g) of the English Bankruptcy Act of 1883. Given that s. 3(1)(i) of the BA 1967 is almost an exact duplicate of s. 4(1)(g) of the English Bankruptcy Act of 1883 and of s. 1(1)(g) of the English Bankruptcy Act of 1914 (otherwise an exact duplicate if not for the *mutatis mutandis* changes), the English authorities on the English Bankruptcy Acts of 1883 and 1914 are therefore relevant on the meaning and application of the words "execution thereon not having been stayed".

**[17]** In construing the words "execution thereon not having been stayed", the English courts referred to O. 42 r. 23 of the English Rules of the Supreme Court 1884 which provided:

> 23. In the following cases, *viz.*:
>
> (a) Where six years have elapsed since the judgment or date of the order, or any change has taken place by death or otherwise in the parties entitled or liable to execution; ...
>
> the party alleging himself to be entitled to execution may apply to the Court or a judge for leave to issue execution accordingly. And such Court or judge may, if satisfied that the party so applying is entitled to issue execution, make an order to that effect, or may order that any issue or question necessary to determine the rights

A of the parties shall be tried in any of the ways in which any question in an action may be tried. And in either case such Court or judge may impose such terms as to costs or otherwise as shall be just.

**[18]** The meaning of s. 4(1) of the English Bankruptcy Act of 1883 was first considered by the Court of Appeal in *Re ex parte Woodall* (1884) 13 QBD 479,
B where the executor of the judgment creditor served a bankruptcy notice on the judgment debtor. The executor had not obtained leave from the court, under r. 23 of O. XLII of the Rules of the Supreme Court of 1884, to issue execution on the judgment. The bankruptcy notice was not complied. The executor presented a bankruptcy petition against the judgment debtor. The
C registrar made a receiving order. The debtor appealed. It was argued for the executor that r. 23 of O. XLII applied only to issuing execution on the judgment and had no relation to proceedings in bankruptcy.

**[19]** Baggallay J held that the words "and execution thereon not having been stayed" tend to show that the creditor must be a person who is in a
D position to issue execution upon the final judgment.

> The objection is that, as she is not the person who actually obtained the final judgment, it is essential that she should first have obtained leave from the Court, under r. 23 of Order XLII., to issue execution on the judgment. It is contended by Mr. Woolf that there is nothing in sub-s.
E 1 (g) to limit the generality of the expression, "a creditor who has obtained a final judgment," and that it must include the representative of the original creditor after his death, and his assignee. On the other hand, it is contended by the appellant that the representative of the person who originally obtained the final judgment does not fill the character of creditor under sub-s. 1 (g), if he has not obtained leave under r. 23 to issue
F execution. If it were not for the words which immediately follow, "and execution thereon not having been stayed," I think there would have been strong ground for adopting Mr. Woolf's view. But those words tend to shew that the creditor spoken of must be a person who is in a position to issue execution upon the final judgment. The original creditor is in that position, if there has been no stay of execution. If the person who applies
G for the notice is the executor of the original judgment creditor he does not, as I read the sub-section, fill the required character until he has obtained leave to issue execution on the judgment. On this ground I think that the appeal must be allowed, and the receiving order be discharged.

**[20]** Cotton and Lindley LJJ expressed the same opinion.

H

> Cotton LJ: "We must look at the terms of sub-s. 1 (g), which creates a statutory act of bankruptcy. There are two things which the creditor has to do: he must obtain a judgment, and he is to serve a bankruptcy notice. The same person is to do both things. We must also have regard to the words "execution thereon not having been stayed." It is true that in the
I present case execution on the judgment has not been stayed, but those words point to this, that the creditor must be in a position to issue

execution. The executrix has not obtained the final judgment, and she is not in a position to issue execution on it. Mr. Woolf says that, if she cannot serve a bankruptcy notice now, she will never be able to do so, because, if she obtains leave to issue execution, she will still not be the creditor who has obtained the judgment. In my opinion that would be too refined a construction of the sub-section. It is not necessary, under the present practice, that the executrix should be made a party to the record by *scire facias*, but she can obtain leave to issue execution on the judgment. In my opinion her proper course is to obtain leave to issue execution on the judgment, even if she does not desire actually to issue it; she will then be a creditor, or must be treated as a creditor, who has obtained a final judgment within the meaning of sub-s. 1(g).

Lindley, L.J: "I am of the same opinion. Until the executrix has obtained leave to issue execution on the judgment it seems to me impossible to say that she has brought herself within the true construction of sub-s. 1(g). That sub-section confers a statutory power to do certain things, and the person who is to do them must be a "creditor who has obtained a final judgment." I do not doubt that the executrix is a creditor of the appellant, but she has not, in any sense of the words, obtained a final judgment against him. She can, however, by doing something else, place herself in the position of a creditor who has obtained a final judgment. The words "execution thereon not having been stayed" shew clearly what sort of a creditor is intended. It must be a creditor who is in a position to issue execution on the judgment; it is assumed that execution might have been stayed ... the debtor cannot be required to pay "in accordance with the terms of the judgment" unless the creditor is in a position to issue execution.

**[21]** In *Re ex parte Ide* (1886) 17 QBD 755, the creditor obtained judgment against the firm and execution could immediately issue against the property of the firm. The plaintiffs presented a bankruptcy petition entitled, "*In re Leon M Ide and Edward Godfrey Ide*, trading as Ide & Co." The petition, which alleged that "Leon M Ide and Edward Godfrey Ide, trading as aforesaid," had committed an act of bankruptcy by non-compliance with the bankruptcy notice, was served on Leon M Ide who gave notice of his intention to oppose the making of a receiving order against him. The creditor argued that execution could issue against the member of the firm, as that member had been served with the writ, and was therefore within the meaning of cl. (c) of r. 10 of O. XLII.

**[22]** Lord Esher MR held that the member was a person against whom a creditor had obtained a final judgment, but against whom the creditor could not issue execution without leave. On s. 4(1)(g) of the English Bankruptcy Act of 1883, Lord Esher said that the words "execution thereon not having been stayed" implied that the "judgment must be one upon which execution could go immediately":

Under these circumstances, is he a person against whom, under s. 4, sub-s. 1(g), of the Bankruptcy Act, a bankruptcy notice can be issued, upon failure to comply with which he can be made a bankrupt? Sub-s. 1(g) says:

A "If a creditor has obtained a final judgment against him" (that is against the person whom he proposes to make bankrupt) "for any amount, and, execution thereon not having been stayed," has served on him a bankruptcy notice. It is true that in the present case execution on the judgment has not been stayed, but the words seem to me necessarily to imply that the judgment must be one upon which execution could go
B immediately, unless it was stayed. But here execution cannot go immediately whether it is stayed or not; it cannot go without the leave of the Court. I think, therefore, that this was not a final judgment such as is described in sub-s. 1(g) on which a bankruptcy notice could issue. I decide this case, not by reason of any previous authority which is binding on this Court, for I do not think there is one, but in accordance with what
C seems to have been the view of the Court, or at all events seems to have been in the minds of the judges, although they were not then called upon to decide the point, in the two cases which have been referred to. On the true construction of sub-s. 1(g) I think the appellant was not a person against whom this bankruptcy notice could properly issue, and therefore
D his appeal must be allowed.

**[23]** Bowen and Fry LJJ agreed:

Bowen L.J: "With regard to the construction of sub-s. 1 (g) of s. 4, I also agree that, in order to entitle a creditor to issue a bankruptcy notice, he must be in a position to issue execution on his judgment at the time when
E he issues the bankruptcy notice. It would be absurd to suppose that sub-s. 1(g) admitted of this construction, that in a case in which execution could have gone at once, but for the order of the Court staying it, a bankruptcy notice could not be issued, and yet that, in a case in which execution could never have gone at all without the leave of the Court, a bankruptcy notice could be issued, and the debtor could be adjudged
F a bankrupt. We must look carefully at the words to see if there is not an implication to be found in them, and it seems to me that, from the collocation of the words "final judgment" and "execution thereon not having been stayed," a necessary implication arises of this character, *viz.*, that the creditor must not merely have obtained a final judgment but must be in a position to issue immediate execution upon it." Fry, L.J: "In
G dealing with sub-s. 1(g) in *Ex parte Woodall* (1) Lindley, L.J., said (at p. 483), "The words 'execution thereon not having been stayed' shew clearly what sort of a creditor is intended. It must be a creditor who is in a position to issue execution on the judgment; it is assumed that execution might have been stayed." With that view of the sub-section I
H entirely agree. It would be very strange if the enactment were that a bankruptcy notice could not be issued when execution on the judgment had been stayed, and yet that a bankruptcy notice could be issued when execution could not go at all without the leave of the Court, and the proceedings had not been stayed simply for that reason. I agree that this appeal must be allowed.

I **[24]** In *Re Connan, ex parte Hyde* [1888] 20 QBD 690, the judgment creditor obtained a final judgment against the debtor, but the debt was attached by a garnishee absolute. The bankruptcy notice was served when the debt was

attached. The Court of Appeal was unanimous that the creditor was not a person who had obtained a final judgment on which execution had not been stayed. Fry and Lopes LJJ, who delivered separate judgments, put it as follows:

> Fry LJ: "The question is, whether the creditor who has served that notice is a person who has obtained a final judgment against the debtor on which execution has not been stayed, within s 4(1)(g) of the Bankruptcy Act, 1888. In my opinion, he is not such a person. I have said that the effect of making the garnishee order absolute was to entitle Making to levy execution on the judgment. But the effect of it was also to make a stay of execution so far as Hyde was concerned. It may be that there is a right on Hyde's part to have that stay removed by applying to the court, either under r 23 of Ord 42 or under its general jurisdiction. No such application was made, and the fact is, that during the whole of the seven days when the bankruptcy notice was pending, Making might have issued execution against Connan. If Connan had paid Making the amount of the debt during the same period, Connan would have been under no further liability in respect of it. Therefore, at the time when the bankruptcy notice was served, there was a stay of execution upon the judgment so far as Hyde was concerned, by reason of the garnishee order."
>
> Lopes LJ: "The question is, whether execution has been stayed in this case? I think that the effect of the garnishee order was to stay execution so far as Hyde was concerned. While the garnishee order was in force he could not issue execution."

**[25]** The *ratio* that determined the outcome in those three English cases was not that bankruptcy was a form of execution and therefore had to comply with the Rule of Court relating to execution. Rather, the *ratio* was that the creditor must be in a position, when he issued the bankruptcy notice, to levy immediate execution upon the judgment, should he choose to levy execution. In *Woodall*, Baggallay J held that the words "and execution thereon not having been stayed" tend "to shew that the creditor must be a person who is in a position to issue execution upon the final judgment", Cotton LJ said that they meant "that the creditor must be in a position to issue execution", while Lindley said those words "shew ... a creditor who is in a position to issue execution on the judgment". And in *Ide*, Lord Esher MR enunciated that the words "execution thereon not having been stayed" implied that the "judgment must be one upon which execution could go immediately", and Bowen LJ said "that in order to entitle a creditor to issue a bankruptcy notice, he must be in a position to issue execution on his judgment at the time when he issues the bankruptcy notice ... must be in a position to issue immediate execution upon it".

**[26]** It was upon interpretation of the words "execution thereon not having been stayed" that the English courts reached the result. "For the issue of bankruptcy notice to be valid, the creditor must be in a position to levy execution ..." (*Sales' The Law Relating to Bankruptcy, Liquidations and*

A *Receiverships* 6th edn. p. 16). The Rule of Court relating to execution was only referred, to see if the creditor, when he issued the bankruptcy notice, was in that position to issue immediate execution upon the judgment, if he chose to. That was the approach of the English court, even decades later, in *James v. Amsterdam-Rotterdam Bank NV and another* [1986] 3 All ER 179, that is, up
B and until the advent of the English Insolvency Act of 1986 "which swept away the concept of "acts of bankruptcy" and replaced it with a single concept, *to wit*, the inability of the debtor to pay ... The statutory demand procedure was introduced ... This brings individual insolvency more in line with the corresponding provisions in relation to limited companies"
C (see *Personal Insolvency: A Practical Guide* by Grier and Floyd 2nd edn. at 1.20).

**[27]** As said, s. 3(1)(i) of the BA 1967 is almost identical with s. 4(1)(g) of the English Bankruptcy Act of 1883 and with s. 1(1)(g) of the English Bankruptcy Act of 1914. The enunciation by English courts on the meaning
D and application of the English provisions are therefore eminently relevant. Accordingly, *In Re SMRM Sithamparam Chettiar; ex parte Sundra Singh* [1934] 1 LNS 23; [1935] 1 MLJ 38, Mudie J relied on *Woodall* and *Ide* and allowed the motion to set aside the bankruptcy notice on the ground that the creditor was not in a position to proceed with execution.

E The date of the judgment on which the Bankruptcy Notice is founded is the 21st day of November, 1932. After the expiration of a year from that date the creditor is unable to obtain execution without the leave of the court under the provisions of ss. 246 and 247 of the Civil Procedure Code, 1918. No application for leave has been made. It is argued that this amounts to a stay of execution, and that the Bankruptcy Notice ought not
F to have been issued. It is clear from s. 4(i)(i) and 4(ii), r. 90, read with the prescribed Forms Nos. 4 and 5 that a Bankruptcy Notice cannot issue where execution on the judgment has been stayed. It is argued for the respondent that no order for a stay of execution has been made, and that s. 246 of the Civil Procedure Code has no application. This point was considered by the Court of Appeal in *Ex parte Woodall, In re Woodall* 13
G QBD 479, where it was held that the executor of a creditor who has obtained a final judgment is not entitled to issue a bankruptcy notice against the judgment debtor, unless he has obtained leave from the court, under r. 23 of O. XLII of the Rules of the Supreme Court of 1883, to issue execution on the judgment. Under sub-s. 1(g) of s. 4 of the Bankruptcy
H Act, 1883, the creditor who issues a bankruptcy notice must be in a position to issue execution on the judgment.

In *Ex parte Ide, In re Ide* 17 QBD 755, the Court of Appeal decided that where a creditor has obtained judgment against a firm, but has not obtained the requisite leave under Order XLII., rule 10, to issue execution against a person alleged to be a member of the firm, he cannot serve such
I person with a notice under the Bankruptcy Act 1883 (46 and 47 Vic c 52), section 4, sub-section 1 (g), which enables a creditor who has obtained final judgment against a debtor, "execution thereon not having been stayed," to issue a notice requiring the debtor to pay or secure the debt.

The following passage appears in the judgment of Bowen, L.J., at page 759:

> With regard to the construction of sub-section 1 (g) of section 4, I also agree that, in order to entitle a creditor to issue a bankruptcy notice, he must be in a position to issue execution on his judgment at the time when he issues the bankruptcy notice. It would be absurd to suppose that sub-section 1(g) admitted of this construction that in a case in which execution could have gone at once, but for the order of the Court staying it, a bankruptcy notice could not be issued, and yet that, in a case in which execution could never have gone at all without the leave of the Court, a bankruptcy notice could be issued, and the debtor could be adjudged a bankrupt. We must look carefully at the words to see if there is not an implication to be found in them, and it seems to me that, from the collocation of the words 'final judgment' and 'execution thereon not having been stayed,' a necessary implication arises of this character, *viz.*, that the creditor must not merely have obtained a final judgment but must be in a position to issue immediate execution upon it.

On these authorities I am of opinion that the applicant must succeed on the second ground.

**[28]** Henceforth, *Woodall* and or *Ide* were cited, whenever the meaning of s. 3(1)(i) of the BA 1967 was called into question.

**[29]** In *Low Mun v. Chung Khiaw Bank Ltd* [1987] 2 CLJ 400; [1987] CLJ (Rep) 172; [1988] 1 MLJ 263, where the main issue for determination was whether a bankruptcy notice for a specified sum and also an unspecified sum of interest might be founded under s. 3(1)(i) of the Bankruptcy Act 1967, the former Supreme Court per Mohamed Azmi SCJ, later FCJ, enunciated as follows:

> It is also essential that at the time of issue of the bankruptcy notice, the judgment creditor must be in the position to issue execution – see *In re Woodall, ex parte Woodall* (1884) 13 QBD 479. If part of the debt has been paid or unenforceable in bankruptcy, the notice can only be issued for the balance – see *Re A Debtor* [1938] 2 All ER 824. Thus, a bankruptcy notice can only be issued for the judgment debt or that part of the debt on which the creditor can issue execution.

**[30]** In *Wee Chow Yong, Ex P; Public Finance Bhd* [1990] 1 CLJ 176; [1990] 3 CLJ (Rep) 349; [1989] 3 MLJ 508, Edgar Joseph Jr J, as he then was, relied on *Woodall* and *Ide* to hold that leave is required for the commencement of a bankruptcy proceeding founded on a judgment that is more than six years old:

> In *Re Woodall, ex p Woodall* (1884) 13 QBD 479, one Houlston had recovered a final judgment against *Woodall*. Houlston then died and his executrix served a bankruptcy notice on *Woodall* without obtaining leave from the court under r. 23 of O XLII of the RSC 1883 to issue execution

on the judgment. The bankruptcy notice not having been complied with, the executrix presented a bankruptcy petition. The registrar made a receiving order.

On appeal, the question for decision was whether the executrix was a 'creditor' within the meaning of s. 4 sub-s. 1(g) of the Bankruptcy Act 1883. It was argued that the representative of the person who originally obtained the final judgment does not fill the character of creditor under sub-s. 1(g), if he has not obtained leave under r. 23 to issue execution. In upholding that submission, Baggally LJ said:

> But those words ('and execution thereon not having been stayed in sub-s 1(g)) tend to show that the creditor spoken of must be a person who is in a position to issue execution upon the final judgment. The original creditor is in that position. If the person who applies for the notice is the executor of the original judgment creditor he does not, as I read the subsection, fill the required character until he has obtained leave to issue execution on the judgment.' The cases of *Re Ide* (1886) 17 QBD 755 and *Re Woodall* (1884) 13 QBD 479 have stood unchallenged for more than 100 years and I take it that they represent the law on the point concerned. To my mind, it is not an unfair summary of the position in the UK to say that a creditor can issue a bankruptcy notice only when he has obtained a final judgment or a final order. The judgment or order must be one on which the creditor is in a position to issue execution so that if execution cannot be issued at all, no bankruptcy notice can be issued. If the execution can be issued only with leave of the court, the creditor must obtain such leave before he can issue a bankruptcy notice. It was urged upon me by counsel for the judgment creditor that I should decline to follow the cases of *Re Ide* (1886) 17 QBD 755 and *Re Woodall* (1884) 13 QBD 479 because, in this country, unlike in the UK, we have r 276 of the Bankruptcy Rules 1969 ('the BR'), which expressly provides that the Rules of the Supreme Court (now the Rules of the High Court 1980) regulating the procedure in its civil jurisdiction shall not apply to any proceedings in bankruptcy. Accordingly, it was submitted that there being no requirement in the BR that leave was required for commencing bankruptcy proceedings founded on a judgment entered more than six years previously, no such leave was required. As such, the only bar to the commencement of bankruptcy proceedings would be if and when a judgment creditor is barred by s 6(3) of the Limitation Act 1953, so ran counsel's submission. I regret I find counsel for the judgment creditor's submission regarding this part of the case unacceptable. In my opinion, the overriding consideration here is, as I have indicated, the proper interpretation of s 3(1)(i) of our Act. I am not at liberty to brush aside the explicit provisions of s 3(1)(i) merely because of r 276 of the BR. Accordingly, if there is any conflict between these two measures I would regard s 3(1)(i) as having overriding effect since it ranks as principal legislation

> whereas the BR are subsidiary legislation. (See s 23(1) of the Interpretation (States of Malaysia) Act 1967.) In my view, therefore, the UK decisions are of direct relevance when construing s 3(1)(g) of our Act and I would respectfully follow them.

**[31]** And in *Re Ahmad Lazim & Anor, Ex P Bank Kerjasama Rakyat (M) Bhd* [1999] 2 CLJ 101; [1999] 5 MLJ 478, Clement Skinner JC, as he then was, followed *Wee Chow Yong* and held that bankruptcy is not execution, but that if execution could only be issued with leave of the court then leave must be obtained before a bankruptcy notice could be issued thereon. Clement Skinner JC, touched on the historical background:

> That the issue of a bankruptcy notice is not execution to enforce a judgment is not in dispute. This was made very clear in *Wee Chow Yong*, where the learned judge went out of his way to point this out when he said at p 510: 'I would make the preliminary observation that the issue of a bankruptcy notice is not execution to enforce a judgment (see eg *Re A Bankruptcy Notice*, per Chitty LJ at p 386).' However, the decision in *Wee Chow Yong* makes it clear that if more than six years have elapsed since a judgment is obtained, and leave has not been obtained to execute that judgment, the judgment creditor cannot be described as being in a position to issue execution on that judgment. If execution can be issued only with leave of the court, such leave must be obtained before a bankruptcy notice can be issued thereon.
>
> I should point out that the reason such leave is required is because of the words 'and execution thereon not having been stayed'. These words, which appear in s 4(1)(g) of the UK Bankruptcy Act 1883, and also in s 3(1)(i) of our Bankruptcy Act 1967 have been interpreted in the case of *Re Woodall* (per Lindley LJ) and in *Re Ide* (per Bowen LJ) to mean that a judgment creditor must not merely have obtained a final judgment but must be in a position to issue execution upon it.
>
> ...
>
> As regards to the submission that leave under O 46 r 2(1) of the RHC is not required because such leave in UK refers to a master's flat which is a thing unknown and not required in Malaysia, I cannot agree with this argument. Whilst as a matter of practice in UK, a master's flat is required, a reading of the case of *Re Ide* and *Re Woodhall* will show that the learned appeal judges were referring to the leave expressly required under rr 10 and 23 of Order XLII, respectively, of the English Rules of the Supreme Court 1883, to enforce a judgment in the situations therein stated. In Malaysia, the leave provisions are found in our O 46. The fact that we do not require a master's flat to issue a bankruptcy notice does not mean that a judgment creditor need not comply with a substantive provision of the Bankruptcy Act, namely, s 3(1)(i), to show that he is in a position to issue execution on his judgment when the bankruptcy notice is issued.

**[32]** Hence, it has for ages been that at the time of issue of the bankruptcy notice, the judgment creditor must be in the position to issue execution.

**[33]** Then came *Lim Ah Hee* and *Tan Tem Son*, which allegedly departed from history and case law, and broke ranks with jurisdictions which shared the legacy of the English Bankruptcy Act of 1883. But was that indeed so?

**[34]** In *Lim Ah Hee*, the judgment creditor obtained judgment against the judgment debtor on 23 October 1987. In 1996, the judgment creditor took out a bankruptcy notice ('BN') and had the same served on the judgment debtor. The judgment debtor raised a preliminary objection that the sum demanded was wrong, in that it included a statute-barred debt. The High Court dismissed the preliminary objection. The Court of Appeal allowed the judgment debtor's appeal. The judgment creditor obtained leave to appeal on the following questions: (a) whether the second limb of s. 6(3) of the LA 1953 was relevant and applicable to bankruptcy proceedings; and (b) whether the BN was valid under s. 3(2)(ii) of the BA 1967 if the judgment debtor did not dispute that the claim stated in the BN was excessive within seven days from the date of service of the BN.

**[35]** Section 6(3) of the LA 1953 provided that "An action upon any judgment shall not be brought after the expiration of twelve years from the date on which the judgment became enforceable and no arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due".

**[36]** The issue in *Lim Ah Hee* was whether the arrears of interest sought to be recovered ran counter to the second limb of s. 6(3) of the LA 1953. Abdul Hamid Mohamad FCJ, as he then was, fully appreciated that:

> Lest I get carried away, I should remind myself that I am only dealing with the issue whether the second limb of the Limitation Act 1953 is applicable to bankruptcy proceedings. The High Court in this case held it does not and the Court of Appeal held it does. The answer really lies in the interpretation of s. 6(3) itself.
>
> Rather than merely reproducing s. 6(3) what more only the so-called 'second limb', I think we should look at the whole scheme of the Act.

**[37]** From paras. 19 to 41 of its judgment (the preceding paragraphs merely recited the facts and submission of learned counsel), this court in *Lim Ah Hee* then deliberated on the LA 1953, in particular on 'action' as defined in s. 2, on the question as to whether a bankruptcy proceeding is a 'suit' or a 'proceeding in court', on the rule of court relating to execution, and, on an action upon a judgment. In those paragraphs, this court in *Lim Ah Hee* held that the case of *WT Lamb & Sons v. Rider* [1948] 2 KB 331, which was not a bankruptcy case, was authority that a plaintiff who has a judgment more than six years is not entitled to issue execution upon it except with the leave of court (see para. 31), that a bankruptcy notice or bankruptcy petition is not a writ of execution (see para. 31), that the nett effect of *Lowsley and another v. Forbes* [1998] 3 WLR 501, which was not a bankruptcy case, was (1) an action upon a judgment must be brought within six years (s. 24 of the English

Limitation Act of 1980 provided that an action upon a judgment shall not be brought after the expiration of six years from the date on which the judgment became enforceable), (2) "execution of judgment is not subject to a limitation period. However, leave must be obtained if the execution is to be done after the period of six years", and, (3) even if it is by way of execution of a judgment, interest may only be recovered for a period of six years (see para. 41).

**[38]** From paras. 42 to 45 of its judgment, this court in *Lim Ah Hee* (1) reflected on *United Malayan Banking Corporation Bhd v. Ernest Cheong Yong Yin* [2002] 2 CLJ 413; [2002] 2 MLJ 385, which was a bankruptcy case, where the appellant obtained a summary judgment on 15 October 1987 with interest from 1 April 1986 until full realisation, where the appellant, on 24 January 1996 (eight years and three months after the judgment) filed a bankruptcy notice but only claimed interest for six years from the date of the judgment, and, (2) held that *Ernest Cheong* assumed that s. 6(3) of the LA 1953 applied (see para. 45). At paras. 46 and 47 of its judgment, this court in *Lim Ah Hee* then touched, fleetingly, on *Moscow Narodny Bank Ltd v. Ngan Ching Wen* [2004] 2 CLJ 241.

**[39]** On the issue at hand (see para. 48), that is, whether the arrears of interest sought to be recovered ran counter to the second limb of s. 6(3) of the LA 1953, this court in *Lim Ah Hee* said:

> Coming back to the issue now before this court. In my view, the answer lies in the answers to the following questions:
>
> (1) whether a bankruptcy proceeding is an 'action' within the meaning of s. 6(3) of the Limitation Act 1953 as defined in s. 2 of the same Act;
>
> (2) whether the 'two limbs' of s. 6(3) should be read disjunctively or conjunctively.

**[40]** In relation to those self-posed questions, this court in *Lim Ah Hee* answered:

(i) a bankruptcy proceeding is not 'a writ of execution' within the meaning of O. 46 r. 2 RHC (see para. 49),

(ii) a bankruptcy proceeding is an action within the meaning of 'action' in s. 2 of the Limitation Act 1953 and therefore caught by s. 6(3) of the Limitation Act 1953 (see paras. 50 to 53, 58),

(iii) "if execution is to be done after six years leave of court must be obtained" (see para. 57),

(iv) section 6(3) of the Limitation Act 1953 should be read together as a whole (see para. 57), and

(v) a bankruptcy proceeding is an 'action upon (a) judgment' within the meaning of s. 6(3) and the limitation for bringing the action is 12 years but the arrears of interest may only be claimed for six years (see para. 58 and 60).

**[41]** At para. 61 of its judgment, this court in *Lim Ah Hee* thus answered the first leave question:

> 61 In the circumstances I would answer the first question posed to this court in the affirmative ie s 6(3) applies to bankruptcy proceedings and while a bankruptcy proceeding may be brought within 12 years of the date of judgment, arrears of interest may only be claimed for a period of six years from the date of the judgment.

**[42]** However, this court in *Lim Ah Hee* declined to answer the second leave question (see para. 81).

**[43]** But that which became increasingly apparent as *Lim Ah Hee* was examined was this. *Lim Ah Hee* held that a bankruptcy proceeding is not execution, and that a bankruptcy proceeding is an action within the meaning of 'action' in s. 2 of the LA 1953 and therefore caught by s. 6(3) of the LA 1953. But *Lim Ah Hee* did not say and did not rule, for there was no discussion or ruling on the meaning of the words "execution thereon not having been stayed", that a judgment creditor, when he issued the BN, must be or need not be in a position to issue immediate execution (emphasis added). In *Lim Ah Hee*, that was not the issue. As Abdul Hamid Mohamed FCJ had put it, "Lest I get carried away, I should remind myself that I am only dealing with the issue whether the second limb [of s. 6(3)] of the Limitation Act 1953 is applicable to bankruptcy proceedings. The High Court in this case held it does not and the Court of Appeal held it does. The answer really lies in the interpretation of s. 6(3) itself." The issues in *Lim Ah Hee* had nothing to do with the meaning of the words "execution thereon not having been stayed" in the context of s. 3(1)(i) of the BA 1967. Rather, the issues in *Lim Ah Hee* had to do with the applicability of s. 6(3) of the LA 1953 to bankruptcy proceedings, and the validity of a bankruptcy notice where the judgment debtor had not disputed the claim stated in the BN within seven days from the date of service of the BN.

**[44]** *Lim Ah Hee* had not ruled on the meaning of the words "execution thereon not having been stayed" in the context of s. 3(1)(i) of the BA 1967, and so could not have departed from history and case law. Indeed, we could agree with *Lim Ah Hee* (1) that a bankruptcy proceeding is not 'a writ of execution' within the meaning of O. 46 r. 2 RHC, as "The issue of a bankruptcy notice is not a form of execution (*Re a Bankruptcy Notice* [1898] 1 QB 383). However, it is said that the creditor must be in a position to issue execution in order to issue a bankruptcy notice, the words of s. 1(1)(g) of the English Bankruptcy Act of 1914 being "execution thereon not having been

stayed" (see Weaving's Notes on *Bankruptcy in County Courts* 7th edn. at p. 5), (2) that "if execution is to be done after six years leave of court must be obtained", and, (3) that s. 6(3) of the LA 1953 should be read together as a whole.

**[45]** Perhaps, when *Lim Ah Hee* ruled that a bankruptcy proceeding is not execution, it implied that a bankruptcy proceeding need not comply with O. 46 of the RHC. But *Lim Ah Hee* did not say that leave is not required to issue a bankruptcy notice, where six years have lapsed since the judgment or date of the order. Hence, with respect, we could not agree with the trial court that it was held in *Lim Ah Hee* that "a bankruptcy proceeding is not executionary proceedings in the sense that it is a continuation of a judgment and that no leave is required to issue the bankruptcy notice after six years".

**[46]** The case that dealt with the meaning of the words "execution thereon not having been stayed" was *Tan Tem Son*, where the leave questions read:

(1) Whether the phrase 'any person who is for the time being entitled to enforce a final judgment' in the proviso to s. 3(1)(i) of the Bankruptcy Act 1967 requires the judgment creditor to obtain leave pursuant to O. 46 r. 2(1)(a) of the Rules of the High Court 1980 prior to initiating a bankruptcy proceeding based on a final judgment which has been obtained more than six years ago, particularly in view of the conflicting decisions by the courts in the cases of:

   (i) *Perwira Affin Bank Bhd v. Lim Ah Hee @ Sim Ah Hee* [2004] 3 MLJ 253 (FC) and *Re Chan Boon Heng ex p Associated Tractors Sdn Bhd* [2009] 2 CLJ 552 (HC) – which answers the question above in the negative; and

   (ii) *Chin Sin Lan v. Delta Finance Bhd* [2004] 3 MLJ 178 (COA); *Re v. Gopal ex p Bank Buruh (M) Berhad* [1987] 1 CLJ 602 (HC); *Wee Chow Yong t/a Vienna Music Centre v. Public Finance Bhd* [1989] 3 MLJ 508 (HC); *Liew Kong Ken ex p Sucorp Enterprise Sdn Bhd* [1998] 2 CLJ Supp 508 (HC); *Re Haji Ahmad bin Lazim & Ors ex p Bank Kerjasama Rakyat (M) Sdn Bhd* [1999] 5 MLJ 478 (HC); *Re Low Tung Kwai ex p Perwira Affin Bank Bhd* [2001] 6 MLJ 39 (HC); *Tengku Iskandar bin Tengku Ahmad v Sime Bank Bhd* [2002] 1 MLJ 312 (HC); *Tan Ah Tong v Dato' Seri Dr Kuljit Singh* [2002] 6 MLJ 39 (HC) and *Re Lee Che Peh @ Lee Chee Peh ex p Tractors Malaysia (1982) Sdn Bhd* [2003] 5 MLJ 463 (HC) – which answer the question above in the affirmative.

(2) Whether as a matter of law part payments made would extend the limitation period of a judgment under s 6(3) of the Limitation Act 1953 pursuant to s 26(2) of the Limitation Act 1953, in particular with reference to s 5 of the Limitation Act 1953;

(3) In the event question (2) above is answered in the affirmative, whether the filing of a bankruptcy notice within six years from the extended limitation period would require leave of court under O. 46 r. 2(1)(a) of the Rules of the High Court 1980?

**[47]** In *Tan Tem Son*, it was directly asked whether the words "any person who is for the time being entitled to enforce a final judgment" in the context of s. 3(1)(i) of the BA 1967, require a judgment creditor to obtain leave pursuant to O. 46 r. 2(1)(a) of the RHC before he could initiate a bankruptcy proceeding that is based upon a final judgment obtained more than six years ago, or, whether a judgment creditor could issue bankruptcy without the leave of court, where the final judgment was obtained more than six years ago.

**[48]** At paras. 34 and 35 of its judgment (the preceding paragraphs merely recited the facts and submission of learned counsel), this court in *Tan Tem Son* thus made out the leave questions:

> The first question on which leave to appeal was granted by this court brings into focus again the interpretation and the application of s. 3(1) of the BA 1967 ... It is the interpretation and effect of the phrase 'if a creditor has obtained a final judgment or order ... and execution thereon not having been stayed' in that section and the phrase, 'any person who is for the time being entitled to enforce a final judgment or final order shall be deemed to be creditor who has obtained a final judgment or final order' in the proviso to the section that lies at the heart of the present appeals.

**[49]** First and foremost, this court in *Tan Tem Son* made the following observations and or rulings: *Abigroup Ltd v. Abignano* (1992) 112 ALR 497 was of no assistance in the interpretation of s. 3(1)(i) of the BA 1967 (see para. 36). The cases referred to in the first leave question, namely, *Liew Kong Ken*, *Re Haji Ahmad*, *Re Low Tung Kwai*, *Tengku Iskandar*, *Tan Ah Tong* and *Re Lee Che Pah*, all relied upon *Re V Gopal* and/or *Wee Chow Yong*. The *dicta* in *Low Mun*, which case was not concerned with the issuance of bankruptcy notice upon a judgment more than six years old, and the *dicta* in *Chan Sin*, where the critical issue was limitation, to the effect that under s. 3(1)(i) of the BA 1967 a judgment creditor must be in position to issue execution, were *obiter*. *Re V Gopal* and *Wee Chow Yong* relied upon *Woodall* and *Ide* (see paras. 38-43). It was held in *Ide* that a creditor who obtained judgment against a firm but not the requisite leave under O. XLII r. 10 of the Rules of the Supreme Court 1884 to issue execution against a person alleged to be a member of the firm, could not serve such person with a bankruptcy notice under s. 4(1)(g) of the Bankruptcy Act 1883 (see para. 44).

**[50]** At paras. 46 and 47 of its judgment, this court in *Tan Tem Son* imparted its first comments on *Ide*:

> In other words, the rule is, even if there is no stay in the sense that there is no stay of execution granted by court, if execution upon the judgment could not go immediately, a stay will be implied. But there was no elaboration why the implication that the judgment must be one upon which execution could go immediately, unless it was stayed must be read

into the phrase 'if a creditor has obtained a final judgment against him and execution thereon not having been stayed' under s. 4(1)(g)? However His Lordship explained why he decided the case as such:

> I decide this case, not by reason of any previous authority which is binding on this court, for I do not think there is one, but in accordance with what seems to have been the view of the court, or at all events seems to have been in the minds of the judges, although they were not then called upon to decide the point, in the two cases which have been referred to. On the true construction of sub-s 1(g) I think the appellant was not a person against whom this bankruptcy notice could properly issue, and therefore his appeal must be allowed.

So, it was not because there was any existing binding authority on the point, but according to what seemed to His Lordship to be the view of the court or to be in minds of the judges at that time. Why the court or the judges formed that view was not clear from the judgment. One of the two cases referred to in the aforesaid passage of Lord Esher's judgment was *Woodall*.

**[51]** But it was only at para. 50 of its judgment, that this court in *Tan Tem Son* revealed its reasoning for its disapproval of *Woodall* and *Ide*:

> From what has been said thus far it is clear that at the time *Re Ide*, and *Woodall* were decided, s. 4(1)(g) of the Bankruptcy Act 1883 did not contain the proviso similar to the proviso to s. 3(1)(i) of the BA 1967. The proviso was added later on 18 August 1890. So, contrary to what was said by learned judge in *Re V Gopal*, (and *Wee Chow Yong*) s 3(1)(i) of the BA 1967 was not in *pari materia* with s. 4(1)(g) of the English Bankruptcy Act 1883 at the time when *Re Ide* and *Woodall* were decided. Secondly, it is also clear that in *Re Ide* and *Woodall*, the judgment creditors were held not to be in the position to execute immediately, hence they were not creditors within the meaning under s. 4(1)(g) of the Bankruptcy Act 1883, not on account of their failure to apply for leave to execute judgment after six years from the date of the judgment. Both cases had nothing to do with that. As would be recalled, in *Re Ide* the judgment creditor who had obtained judgment against a firm of partnership, did not have the requisite leave from the court to enforce the judgment against a partner of the firm. In *Woodall*, the wife of the deceased judgment creditor did not have the requisite leave to issue execution on the judgment obtained by her deceased husband. So, in our view it is questionable whether the two cases are appropriate authorities to support the decision of the High Court in *Re V Gopal*, and indeed the later case of *Wee Chow Yong*. Another matter which in our view underminds the appropriateness of *Re V Gopal* as an authority for the interpretation of s. 3(1)(i) of the BA 1967 is this. In *Re V Gopal*, the learned judge found that the bankruptcy notice was caused to be issued a few days before six years had lapsed, but was only served a few days after six years had lapsed. His Lordship held that on the day the bankruptcy notice was served, since six years had lapsed from the date

of the judgment, the petitioner was not entitled to enforce the judgment as he had not obtained the requisite leave as provided under O 46 r 2(1)(a) of the RHC 1980. With respect, even assuming that he was right in applying O 46 r 2(1)(a) of the RHC in that case, the relevant date for determining whether the creditor was in a position to issue execution on the judgment would be the date of issue of the bankruptcy notice, not the date of its service (see *Wee Chow Yong*). In other words, if the learned judge had not held the way he did, the judgment creditor was within the six year period, and thus the discussion and the eventual decision whether he was a creditor under s 3(1)(i) of the BA 1967 would not have been necessary.

**[52]** We do not dispute that when *Woodall* and *Ide* were decided, s. 4(1)(g) of the Bankruptcy Act of 1883 did not contain the proviso similar to the proviso to s. 3(1)(i) of the BA 1967. But we fail to appreciate how the absence of that proviso to s. 4(1)(g) of the Bankruptcy Act of 1883 could militate against the reasoning in *Woodall* and in *Ide*. The purpose of the proviso to s. 3(1)(i) of the BA 1967, which reads "Provided that for the purposes of this paragraph and of s. 5 any person who is for the time being entitled to enforce a final judgment or final order shall be deemed to be a creditor who has obtained a final judgment or final order", is to obviate the result as in *Woodall*, where it was held that the executor of the creditor was not a proper person to issue the bankruptcy notice. But that proviso does not add anything to or take anything away from the meaning of the words "execution thereon not having been stayed". Hence, it does not matter that when *Woodall* and *Ide* were decided, s. 4(1)(g) of the Bankruptcy Act of 1883 did not contain the proviso similar to the proviso to s. 3(1)(i) of the BA 1967.

**[53]** It is however pertinent that apart from the proviso, s. 3(1)(i) of the BA 1967 is in *pari materia* with s. 4(1)(g) of the English Bankruptcy Act of 1883 and with s. 1(1)(g) of the English Bankruptcy Act of 1914, and as such, due regard should be given to the enunciation by English courts on the meaning and application of the English provisions. And in connection with that, we do not believe that *Woodall* and or *Ide* could be distinguished merely because of the fact that the creditors in *Woodall* and *Ide* were not creditors within the meaning of s. 4(1)(g) of the Bankruptcy Act of 1883, or because *Woodall* and or *Ide* had nothing to do with leave to execute a judgment that is more than six years old. In both *Woodall* and *Ide*, the question was whether the creditor was in a position to proceed to immediate execution of the judgment. In *Woodall*, the question was whether the executor of the creditor was a creditor within the meaning of s. 4(1)(g) of the Bankruptcy Act of 1883. In *Ide*, the question was whether the creditor could issue execution against a member of the firm. In both cases, the issue had nothing to do with leave to execute a judgment that was more than six years old. But nevertheless, to answer the question whether the creditor was a creditor within the meaning of s. 4(1)(g) of the Bankruptcy Act of 1883, the court in *Woodall* and in *Ide* had to construe

the meaning of the words "If a creditor has obtained a final judgment against him for any amount, and, execution thereon not having been stayed". To settle the question as to whether the creditor was entitled to issue the bankruptcy notice against the debtor, the court in *Woodall* and in *Ide* had to spell out the meaning of those words. And in relation to the identity of the creditor who could issue bankruptcy notice, the English courts were crystal clear. In *Woodall*, the court enunciated that the words "execution thereon not having been stayed" "shew that the creditor spoken of must be a person who is in a position to issue execution upon the final judgment" (per Baggallay J) or meant "that the creditor must be a position to issue execution" (per Cotton and Lindley LJJ). In *Ide*, the court held that the words "execution thereon not having been stayed" implied "that the judgment must be one upon which execution could go immediately" (per Lord Esher), meant "that in order to entitle a creditor to issue a bankruptcy notice, he must be in a position to issue execution on his judgment at the time when he issues the bankruptcy notice" (per Bowen LJ), or showed that the creditor "must be a creditor who is on a position to issue execution on the judgment" (per Fry LJ). To settle the question as to whether the petitioning creditor was entitled to issue the bankruptcy notice against the debtor, the court in *Woodall* and in *Ide* clearly enunciated that a creditor is entitled to issue bankruptcy notice if he is in a position to issue execution on his judgment at the time when he issues the bankruptcy notice. A bankruptcy proceeding is not execution. But the right of the creditor to issue bankruptcy notice is pegged to the right of the creditor to proceed to execution. A creditor is not entitled to issue bankruptcy notice if he is not in a position to issue execution on his judgment at the time when he issues the bankruptcy notice.

**[54]** It should be observed that in relation to its enunciation on the meaning of the words "execution thereon not having been stayed", the English courts only referred to s. 4(1)(g) of the Bankruptcy Act of 1883. No Rule of Court was applied by the English courts to construe the meaning of the words "execution thereon not having been stayed". As said, the Rules of Court were only referred by the English courts, to see if the creditor, when he issued the bankruptcy notice, was in that position to issue immediate execution upon the judgment, if he chose to. But from *Woodall* came forth the principle that a creditor is entitled to issue bankruptcy only if he is in a position to issue execution on his judgment at the time when he issues the bankruptcy notice. And that principle holds true, despite the difference between O. 46 r. 2(1)(a) of the RHC and O. XLll r. 23 of the English Supreme Court Rules of 1884, despite the difference in the bankruptcy rules, and or despite the difference in the facts. If by reason of the Rules of Court or on account of some valid legal reason, a creditor was in no position to issue execution at the time when he issues the bankruptcy notice, then the creditor has no right to issue bankruptcy. It is as simple as that.

**[55]** That was the principle that was followed in *Re: ex parte Follows* [1895] 2 QB 521, where goods taken in execution were claimed by a third party before the sheriff made a return and an interpleader summons was pending, and where it was held by Vaughan Williams J (Wright J concurred) that a bankruptcy notice could not be issued for a sum of money for which execution could not issue, in *Re: ex parte Ford* [1887] 18 QBD 369, where goods taken in execution were claimed by a third party and an interpleader order was made under which the sheriff withdrew from possession, and where it was held by Cave J that there was in substance a stay of execution until the issue in the interpleader was decided and that in the interim the creditor was not in a position to issue execution, in *Re: ex parte Feast* (1887) 4 Morrell's Bankruptcy Reports 36, where Bowen LJ opined that "as long as the judgment is available for execution it is available for bankruptcy, in *Re: ex parte Phillips* (1888) 5 Morrell's Bankruptcy Reports 40, where the bankruptcy notice was issued when an execution was in full force, and it was held by Cave J that when the bankruptcy notice was issued the creditor was not in a position to issue execution, in *Re: ex parte The Debtor* [1906] 1 KB 344, where the creditor accepted a bill for the amount of the debt, and where it was held by Cozens-Hardy MR that the creditor should not be allowed to present a bankruptcy, when he had, by taking the bill, agreed that he would suspend his rights, and where it was held by Fletcher-Moulton LJ that "when there are circumstances under which the court would, if applied to, prevent the issue of execution, those circumstances may bring the case within the interpretation which the court has put upon the words 'execution having been stayed' and that the creditor has to shew that you were in a position to receive payment at the date when you served the bankruptcy notice", and, in *Re: ex parte Greaves* [1913] 2 KB 300, where Phillimore J said that courts construed the words "execution thereon not having been stayed" to mean "a creditor who is in a position to issue execution".

**[56]** Given the weight of the authorities, it must be that under s. 3(1)(i) of the BA 1967, the creditor must be in a position to issue immediate execution. *Re A Kurumpian* [1918] 14 SSLR 144 which held to the contrary, simply could not stand.

**[57]** In our considered opinion, *Woodall* is the first and the foremost authority to follow on the meaning of the words "execution thereon not having been stayed", the meaning of which should be construed in the context of s. 3(1)(i) of the BA 1967, and not from the perspective of s. 6(3) of the LA 1953. Section 6(3) of the LA 1953 should not be read to nullify O. 46 r. 2 of the RHC. Section 6(3) of the LA 1953 provides that "an action upon any judgment shall not be brought after the expiration of twelve years from the date on which the judgment became enforceable and no arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due".

O. 46 r. 2(1)(a) of the RHC is not incompatible with s. 6(3) of the LA 1953. What it all comes to is this: (1) "an action upon a judgment shall not be brought after the expiration of twelve years from the date that the judgment becomes enforceable", (2) "no arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due", and, (3) "a writ of execution to enforce a judgment or order may not issue without the leave of court ... where six years or more have lapsed since the date of the judgment or order".

**[58]** Whether a bankruptcy proceeding is an action upon a judgment is not an issue before us. But it would appear that the definitive word on it might still be unsaid (*Halsbury's Laws of England* 3rd edn. vol. 24 at para. 342 and *Halsbury's Laws of England* 4th edn. reissue vol. 28 at para. 917 are silent on that point; in *National Westminster Bank plc v. Powney and ors* [1990] 2 All ER 416, it was held that an application for leave to issue execution of a judgment was not an action upon a judgment; in *Re A Debtor* [1997] 2 All ER 789, it was held that a bankruptcy proceeding constituted an action on a judgment within s. 24(1) of the English Limitation Act 1980 (which is in *pari materia* with s. 6(3) of the LA 1953); in *Lowsley & Anor v. Forbes* [1998] 3 All ER 897, the House of Lords held that the word 'action' in s. 24(1) of the English Limitation Act of 1980 meant a fresh action, and did not include proceedings by way of execution; in *Ridgeway Motors (Isleworth) Ltd v. ALTS Ltd* [2005] 2 All ER 304, it was held that insolvency proceedings, whether personal or corporate, did not fall within the scope of s. 24(1) of English Limitation Act 1980, in *Re Lim Szu Ang, Ex p Kewangan Utama Bhd* [2005] 7 CLJ 23, it was held that a bankruptcy proceeding is an action on a judgment; in *Re Man Po International Holdings Ltd* [2012] 5 HKC 539, it was held that the winding up petition that was based on a monetary judgment was a fresh action that was caught by s. 4(4) of the HK Limitation Ordinance (Cap 347); in *Re Lau Wan* [2013] 6 HKC 64 and in *Re Li Man Hoo* [2013] 6 HKC 116, it was held that the bankruptcy petition was an action upon a judgment; in *Dennehy (a bankrupt) v. Reasonable Endeavours Pty Ltd* (2003) 130 FCR 494, it was held that s. 5(4) of the Limitation of Actions Act 1958 (vic) (which is in *pari materia* with s. 6(3) of the LA 1953) only applied to new actions upon a judgment and not to the steps taken in the enforcement of a judgment; and, in *O'Mara Constructions Pty Ltd v. Avery* (2006) 230 ALR 581, it was held that insolvency proceedings do not comprise an action upon a judgment or an action on a cause of action on a judgment). *Lim Ah Hee* held that a bankruptcy proceeding is an action upon a judgment. But if a bankruptcy proceeding were an action upon a judgment, then it could not be brought after the expiration of 12 years from the date that the judgment becomes enforceable. If brought within 12 years, the creditor must then be in a position to issue immediate execution.

**[59]** We are ever mindful that *Tan Tem Son* is a recent decision of this court. But *Tan Tem Son* had clearly departed from history and case law. We see no alternative but to put it back to where it was, in line with other jurisdictions with a provision equipollent to s. 3(1)(i) of the BA 1967. For the Singapore position, see *AmBank (M) Bhd v. Yong Kim Yoong Raymond* [2009] 2 SLR 659, where it was held by the Court of Appeal per VK Rajah JA, now AG, delivering the judgment of the court, that "where the words 'execution therein not having been stayed' were used in s. 3(1)(i) (of the Bankruptcy Act 1985] in contrast to the words 'which is enforceable by execution' in s. 61(1)(d) of the present Act, the courts had always insisted that although the question of an execution of a judgment does not arise when a bankruptcy petition is presented, a judgment creditor who seeks to make the judgment debtor bankrupt on the basis of an unsatisfied judgment debt must have in his hands a final judgment that can be enforced forthwith or immediately". For the Australian position, see *Pepper v. McNiece* [1941] HCA 27, where the High Court of Australia, Full Court, announced, "apparently the creditor who issues a bankruptcy notice must be in a position to issue execution on the judgment or order", *Re Pannowitz ex parte Wilson* (1975) 6 ALR 287, where it was held that "a judgment or order can found a bankruptcy notice only if 'execution' may be had upon it", *Re Coast Secorities No 9 Pty Ltd* [1987] 7 FCR 293, where it held that the party seeking the issue of the bankruptcy notice must be in a position to issue execution immediately, and *Penning v. Steel Tube Supplies Pty Ltd* (1988) 80 ALR 689, where *Ide* was followed.

**[60]** With respect, we could not subscribe to the reasoning in *Tan Tem Son*. Also, we could not agree that "any person who is for the time being entitled to enforce a final judgment" in the proviso to s. 3(1)(i) of the Bankruptcy Act 1967 does not require a judgment creditor to obtain leave pursuant to O. 46 r. 2(1)(a) of the Rules of the High Court 1980 prior to initiating a bankruptcy proceeding based on a final judgment which has been obtained more than six years ago. Rather, we hold that any person who is for the time being entitled to enforce a final judgment in the proviso to s. 3(1)(i) of the BA 1967 must be a person who is entitled to enforce a final judgment without prior leave of court. In the instant case, judgment was obtained on 10 October 2000. When the BN was issued on 3 January 2011, the judgment was more than six years old. In other words, when the BN was issued, the respondent was not in a position to execute the judgment without the leave of court. Leave should and could have been obtained (see *ex parte Clements* [1901] 1 QB 260, 263). In that it was not, such that the respondent was then not in a position to execute the judgment, the respondent was not entitled to issue the BN.

**[61]** By reason of the aforesaid, our answer to the first leave question is in the positive, that is to say that a judgment creditor who commences bankruptcy proceedings after more than six years have lapsed from the date of the judgment, must obtain the prior leave of court pursuant to O. 46 r. 2 of the RHC, now replaced by O. 46 r. 2 of the Rules of Court 2012. As our answer to the first leave question will dispose of this appeal, we do not see it necessary to answer the second leave question.

**[62]** For these reasons, we unanimously allow these appeals with costs, both here and below, and set aside the said Bankruptcy Notices.